STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY DIVERGILIO, JR., and VICTORIA A. VALENTINE,

Plaintiffs/Counter-Defendants-Appellants,

v

CHARTER TOWNSHIP OF WEST BLOOMFIELD,

Defendant/Counter-Plaintiff-Appellee,

and

WEST BLOOMFIELD WETLANDS REVIEW BOARD and WEST BLOOMFIELD BOARD OF TRUSTEES,

Defendants-Appellees.

UNPUBLISHED
November 2, 2006

No. 261766
Oakland Circuit Court
LC No. 2000-026598-CZ

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition and declaratory relief in favor of defendants and counter-plaintiff in this action concerning wetland usage and regulation of private residential property. We affirm.

Plaintiffs contend that the Natural Resources Environmental Protection Act ("NREPA"), MCL 324.101 *et seq.*, expressly preempts the local regulation of wetlands. Plaintiffs argue that defendants' ordinances conflict with the NREPA because they improperly shift the burden of proof regarding a determination of essentiality and provide for an environmental features setback. A trial court's grant or denial of summary disposition is reviewed de novo by this Court. *Brunsell v Zeeland,* 467 Mich 293, 295; 651 NW2d 388 (2002). A motion must be granted pursuant to MCR 2.116(C)(8) if no factual development could justify a plaintiff's claim for relief. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). A motion submitted under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). If no dispute exists regarding a fact

material to a dispositive legal claim, *State Farm Fire & Casualty Co v Johnsen*, 187 Mich App 264, 267; 466 NW2d 287 (1990), the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120-121. Whether a state statute preempts a local ordinance is a question of statutory interpretation and involves a question of law that this Court reviews de novo. *Michigan Coalition for Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 405; 662 NW2d 864 (2003).

State law is determined to preempt a municipal ordinance where "1) the statute completely occupies the field that the ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute." *Michigan Coalition for Responsible Gun Owners, supra* at 408, quoting *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). In reference to the second method of preemption delineated above, the Michigan Supreme Court has ruled that "[a] direct conflict exists . . . when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *People v Llewellyn (City of East Detroit v Llewellyn)*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977).

MCL 324.30307(4) provides for a local government to regulate wetlands based on specific criteria including, but not limited to, the requirement that regulation of a wetland of less than two acres in size must comply with the provisions of MCL 324.30309. Plaintiffs contend that the original local ordinance in effect at the time of their application for a wetland use permit impermissibly conflicted with MCL 324.30309 by placing the burden of proof of essentiality of the wetland upon the applicant rather than the local governmental entity. MCL 324.30309 provides in relevant part:

> Upon application for a wetland use permit in a wetland that is less than 2 acres in size, the local unit of government shall approve the permit unless the local unit of government determines that the wetland is essential to the preservation of the natural resources of the local unit of government and provides these findings, in writing, to the permit applicant stating the reasons for this determination.

The local ordinance in effect at the initiation of plaintiffs' permit application provided in significant part:

> If there is to be a denial of a permit to dredge, fill, construct or otherwise alter or undertake an operation in a noncontiguous wetland area of less than two (2) acres, then, on the basis of data presented by the application, or supplemental data gathered by the Township, findings shall be made in writing and given to the applicant stating the basis for the determination that such wetland is essential to the preservation of the natural resources of the Township. [Charter Township of West Bloomfield Ordinances, C-229/C-390-A, § 12-91(f).]
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> The data which must be submitted by the applicant for purposes of making the determination whether a noncontiguous wetland less than two (2) acres is essential to the preservation of the natural resources of the Township shall include

> . . . . [Charter Township of West Bloomfield Ordinances, C-229/C-390-A, § 12-91(g).]

Neither party disputes that the ordinance was subsequently amended in 1997, before the completion of plaintiffs' project and after enactment of 1995 PA 59, "for the purpose of clarifying that the homeowner does not bear the burden of proving that a wetland is not essential to the preservation of the natural resources of the Township." Charter Township of West Bloomfield Ordinances, C-360-B.

Contrary to plaintiffs' assertion, the ordinances and statute are not in conflict because it is the responsibility of the municipality under both the ordinance and the statute to make a determination of essentiality. MCL 324.30307(6) provides, in part:

> The failure to supply complete information with a permit application may be reason for denial of a permit.

This implies that in seeking a wetland permit a portion of the burden is on the applicant to supply sufficient information for the local government to make a determination of essentiality. MCL 324.30307(4) requires that the local ordinance be in conformance with MCL 324.30309, which only indicates that a permit must be approved "unless the local unit of government determines that the wetland is essential to the preservation of the natural resources of the local unit of government." It does not mandate a burden of proof, but rather identifies the entity making the essentiality determination. More importantly, plaintiffs do not contend that they actually were required to provide proof that the wetlands were not essential. Rather, the determination of essentiality was based solely on inspections and evaluations performed by defendants even before plaintiffs' application for a permit.

Plaintiffs further take issue with the alleged failure of defendants to make a determination of essentiality consistent with statutory requirements. MCL 324.30309, designating the factors that must be considered in making a determination of essentiality, is identical in wording to the local ordinance, Charter Township of West Bloomfield Ordinances, C-360-B, § 12-91(f). As early as 1991 defendants determined that the subject property was a wetland based on subsections (c) and (e) of Charter Township of West Bloomfield Ordinances, C-360-B, § 12-91(f). Importantly, plaintiffs neither challenged this finding nor sought a new or alternative determination regarding essentiality. Such passive acquiescence may be construed as an election as permitted by Charter Township of West Bloomfield Ordinances, C-360-B, § 12-91(g)(1), which states:

> In lieu of having the Township or its consultant proceed with the analysis and determination, the property owner may acknowledge that one or more of the criteria in subparagraphs 2(a) through 2(j), above, exist on the wetland in question, including a specification of the one or more criteria which do exist . . . .

Plaintiffs' acknowledgement regarding the existence of the wetland was contained in their initial permit application indicating that the intended construction would have "minimal disturbance and will use sideyard for recreation leaving wetland natural." Plaintiffs' argument is not truly focused on the essentiality of the wetland, but rather on the failure of defendants to comply with

MCL 324.30309, which requires the provision "in writing" of essentiality. MCL 324.30309 states in relevant part:

> Upon application for a wetland use permit in a wetland that is less than 2 acres in size, the local unit of government shall approve the permit *unless the local unit of government determines that the wetland is essential to the preservation of the natural resources of the local unit of government and provides these findings, in writing, to the permit applicant stating the reasons for this determination.* [Emphasis added.]

The above language implies that if the permit is approved, the writing requirement pertaining to an essentiality determination is not required. This is consistent with a reading of defendants' ordinance, which provides in relevant part:

> If there is to be a denial of a permit to dredge, fill, construct, or otherwise undertake an operation, in a noncontiguous wetland area of less than two acres, then, on the basis of data gathered by or on behalf of the Township, findings shall be made in writing and given to the applicant stating the basis for the determination that such wetland is essential to preservation of the natural resources of the Township. [Charter Township of West Bloomfield Ordinances, C-360-B, § 12-91(f).]

Defendants determined that the wetland on plaintiffs' property was essential and approved the permit, albeit with restrictions. Consistent with the above provision, written notification was not required. At no time did plaintiffs ever proceed with plans for this property without treating the wetland as essential. Essentiality of the wetland was discussed at the meeting of the Zoning Board of Appeals on October 15, 1996, regarding this property with plaintiffs being present and acknowledging the existence of this determination by informing the Board "that they understand this is flagged as a wetland and they do not plan to disturb it at all." It is disingenuous of plaintiffs to now suggest that failure to receive formal written notification of essentiality, which was already known and acknowledged to exist, should serve as a basis to preclude enforcement. As this Court has previously determined, "procedural irregularities in fulfilling statutory notice requirements are not grounds for reversal of an administrative action absent a showing of material prejudice." *City of Livonia v Dept of Social Services,* 123 Mich App 1, 18; 333 NW2d 151 (1983). Based on plaintiffs having actual notice of the essentiality determination pertaining to the subject wetland, the notification requirement was fulfilled and plaintiffs cannot claim that they were materially prejudiced by the failure to obtain a separate written determination in accordance with MCL 324.30309.

Plaintiffs also take issue with the imposition of a setback, asserting that it is in violation of MCL 324.30307(4). In support of their position, plaintiffs cite to an opinion by the attorney general that determined:

> [L]ocal units of government may not regulate land adjoining a wetland by imposing a buffer or setback on that land to protect the wetland under the authority of the Natural Resources Environmental Protection Act, and that act preempts any zoning authority to impose buffer or setback zones for the specific purpose of protecting the wetland. [OAG, 1996, No 6892, p 3 (March 5, 1996).]

The attorney general further opined, that setbacks or buffer areas were permissible because:

> [L]ocal units of government are empowered, under their zoning authority, to regulate wetland buffer or setback areas for other purposes utilizing the same types of criteria they might generally use for setback or buffer zones in their zoning ordinance. [*Id.*]

Defendants argue that the provision of a setback or buffer area is contained within their zoning ordinances and is not a part of the wetland ordinances, making the restrictions facially compliant with the implied restrictions of MCL 324.30307(4). The regulation contained within the zoning ordinance is "based on the police power, for the protection of the public health, safety and welfare, including the authority granted in the Zoning Enabling Act." Charter Township of West Bloomfield Zoning Ordinances, § 26-48.

While serving as persuasive authority, attorney general opinions are not binding. *Williams v City of Rochester Hills*, 243 Mich App 539, 554; 625 NW2d 64 (2000). Plaintiffs imply that the NREPA preempts the establishment of buffer or setback zones around environmental features because the local ordinances effectively attempt to intrude on the authority of the NREPA to regulate wetland areas. Notably, plaintiffs fail to distinguish or point out any part of the NREPA that precludes defendants from implementing a setback provision. MCL 324.30307(4) expressly permits a local unit of government to "regulate wetland within its borders" as long as such regulation complies with the NREPA. This provision specifically recognizes that this regulation is "supplemental" to the existing authority of a local unit of government. *Id.* As such, plaintiffs fail to effectively challenge defendants' authority to regulate areas surrounding environmental features such as wetlands through zoning provisions.

In addition, plaintiffs are unable to demonstrate conflict with the cited attorney general opinion, which permits regulation of areas surrounding wetlands for purposes other than wetland protection. The trial court observed that establishment and imposition of the buffer or setback areas were part of the zoning ordinance and met the necessary criteria and purpose of protecting public health and safety, rather than the wetlands themselves, by providing for "water storage areas in storm events and to reduce the need for on-site and off-site stormwater storage capacity."

For their second issue on appeal, plaintiffs argue that defendants' local ordinance fails to comply with MCL 324.30309 in permitting the provision of conditions for approval of a permit rather than comporting with the statutory restrictions of strict approval or denial of a permit. Plaintiffs effectively ignore the wording of MCL 324.30307(6), directly permitting local governmental review of wetland permit applications, and which states in pertinent part:

> The local unit of government shall review the application pursuant to its ordinance and shall modify, approve, or deny the application within 90 days after receipt.

This is consistent with the authority afforded by statute to the state, pursuant to MCL 324.30307(2), which specifically states, "Department approval may include the issuance of a permit containing conditions necessary for compliance with this part." This is consistent with defendants' ordinance, which provides:

> The complete application shall be modified, approved or denied within ninety (90) days after receipt . . . . [Charter Township of West Bloomfield Ordinances, C-229/C-360, § 12-33(f).]

Plaintiffs' interpretation of the statute disregards its plain language. Hence, the trial court did not err in determining that defendants' imposition of conditions upon issuance of the wetland permit was consistent with the authority conveyed by statute and ordinance.

Plaintiffs further contend defendants violated MCL 324.30308(1), which requires, in relevant part:

> A local unit of government that has a wetland ordinance on December 18, 1992 has until June 18, 1994 to complete an inventory map and to otherwise comply with this part, or the local unit of government shall not continue to enforce that ordinance. Upon completion of an inventory map or upon a subsequent amendment of an inventory map, the local unit of government shall notify each record owner of property on the property tax roll of the local unit of government that the inventory maps exist or have been amended, where the maps may be reviewed, that the owner's property may be designated as a wetland on the inventory map, and that the local unit of government has an ordinance regulating wetland. The notice shall also inform the property owner that the inventory map does not necessarily include all of the wetlands within the local unit of government that may be subject to the wetland ordinance. The notice may be given by including the required information with the annual notice of the property owner's property tax assessment.

Contrary to plaintiffs' assertions, defendants presented affidavits verifying the initial creation of the wetland inventory map in 1994. Defendants asserted that the inventory map was, basically, a work in progress and under continual revision. Defendants provided proof that notification of the original inventory map was published in a local newspaper. Contrary to plaintiffs' assertion, notification by this methodology was not precluded as MCL 324.30308(1) suggests "notification . . . with the property owner's property tax assessment," but does not mandate this form of notification. Statutory use of the word "may," based on its ordinary and accepted meaning, generally designates discretion. *Murphy v Sears, Roebuck & Co,* 190 Mich App 384, 386-387; 476 NW2d 639 (1991).

Notably, defendants have not shown full compliance with the requirements of MCL 324.30307(1) in reference to the requirement that upon "subsequent amendment of an inventory map, the local unit of government shall notify each record owner of property . . . that the inventory maps exist or have been amended . . . ." However, plaintiffs have failed to demonstrate any prejudice from failure to notify of subsequent amendments of the inventory map based on their obvious knowledge of the existence of a wetland on their property. Further, MCL 324.30308 provides, in pertinent part:

> A wetland inventory map does not create any legally enforceable presumption regarding whether property that is or is not included on the inventory map is or is not a wetland.

Any alleged reliance by plaintiffs is not justified based on the statutory language and is further belied by the actions of both plaintiffs and defendants in having always treated the subject property as a wetland. Finally, the only indication within MCL 324.30308(1) that a local unit of government cannot enforce its regulatory authority with regard to a wetland is tied only to the initial notification of the existence of an inventory map and not its subsequent amendment. As such, any failure by defendants to provide subsequent notice of revisions to the inventory map is insufficient to preclude local regulation of the wetland on plaintiffs' property.

For their third issue on appeal, plaintiffs present a claim of equitable estoppel. Equitable estoppel is not a cause of action. *American Federation of State, Co & Muni Employees v Bank One, NA*, 267 Mich App 281, 292-293 n 3; 705 NW2d 355 (2005). "[E]quitable estoppel is clearly not an independent cause of action, but is merely a defense to be applied only when a party justifiably relies and acts on the belief that misrepresented facts are true." *Id.* The question of whether estoppel bars a subsequent action or claim is reviewed by this Court de novo. *McMichael v McMichael*, 217 Mich App 723, 726; 552 NW2d 688 (1996).

Plaintiffs assert that the trial court erred in essentially disregarding their equitable estoppel claim. Equitable estoppel arises when "(1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts." *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 828; 346 NW2d 881 (1984). Generally, zoning authorities will not be estopped from enforcing their ordinances unless there are exceptional circumstances. *Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 575-576; 425 NW2d 180 (1988). Casual private advice or assurance of success from a township official does not qualify as an exceptional circumstance. *White Lake Twp v Amos*, 371 Mich 693, 698-699; 124 NW2d 803 (1963).

Plaintiffs imply that the facts of their case present exceptional circumstances, noting that they expended time and money in construction of their home based on the actions and alleged assurances of defendants' agent, through the approval of landscaping work being performed and suggesting that plaintiffs were complying with the imposed permit conditions. However, plaintiffs ignore the fact that they violated the permit conditions in several respects. Plaintiffs provide no evidence that defendants, or their agents, approved their violations of the permit conditions. Defendants approved completed landscaping. However, when it was discovered that plaintiffs were exceeding their permit conditions, by constructing a lower level deck, a review of the property revealed additional permit violations.

The doctrine of equitable estoppel requires reasonable or justifiable reliance. *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998). Plaintiffs cannot claim that they relied on defendants' approvals to justify their blatant violation of the permit conditions through improper and expansive construction on the property. Plaintiffs are not naïve or unsophisticated. Plaintiff Anthony Divergilio, Jr., is a builder/developer and his wife, plaintiff Victoria A. Valentine, is an attorney. Individuals seeking to enjoin a municipality from enforcing an ordinance are "charged with knowledge of the restrictive provisions of the ordinance." *Fass v Highland Park*, 326 Mich 19, 31; 39 NW2d 336 (1949). Further, it is a general rule of equity that "'where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.'" *Rix v O'Neil*, 366 Mich 35, 42; 113 NW2d 884 (1962), quoting *Sheffield Car Co v Constantine Hydraulic Co*, 171 Mich 423, 450; 137 NW 305 (1912). For

equitable estoppel to apply, "[t]he other party must not only have justifiably relied on this belief, but also must be prejudiced if the first party is permitted to deny the facts upon which the second party relied." *Schepke v Dep't of Natural Resources,* 186 Mich App 532, 534-535; 464 NW2d 713 (1990). Plaintiffs' equitable estoppel argument lacks merit because it was unreasonable for plaintiffs to believe that multiple violations of the permit conditions were permissible based solely on approval of landscaping completed and their own knowledge of the permit restrictions.

For their fourth issue on appeal, plaintiffs challenge the validity of defendants' wetlands ordinance as violating their right to substantive due process. This Court reviews de novo a trial court's ruling on a constitutional challenge to a zoning ordinance. *Jott, Inc v Charter Twp of Clinton,* 224 Mich App 513, 525-526; 569 NW2d 841 (1997). A trial court's factual findings are given considerable deference, and those findings will not be disturbed unless this Court would have reached a different result had it occupied the trial court's position. *Id.* at 52. See also *Bell River Assoc v Charter Twp of China,* 223 Mich App 124, 129-130; 565 NW2d 695 (1997).

This Court presumes that a challenged ordinance is valid. *Frericks v Highland Twp,* 228 Mich App 575, 594; 579 NW2d 441 (1998). Plaintiffs may establish that a land use regulation is unconstitutional, either on its face or "as applied" by demonstrating "(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question." *Id.* A facial challenge asserts that the mere existence and potential enforcement of the disputed ordinance materially and adversely affects values and precludes or restricts opportunities of all property regulated in the market. An "as applied" challenge contends a current infringement or denial of a specific right or of a particular injury in the process of actual execution. *Paragon Properties Co v Novi,* 452 Mich 568, 576; 550 NW2d 772 (1996), citing *Village of Euclid, Ohio v Ambler Realty Co,* 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926).

In raising a facial challenge, plaintiffs must specifically demonstrate that the ordinance totally excludes the proposed use in the township, *Kropf v Sterling Hts,* 391 Mich 139, 155-156; 215 NW2d 179 (1974), and that the ordinance precludes any use on the property "to which it is reasonably adapted." *Id.* at 162-163. To invalidate the ordinance on either basis, plaintiffs must further show that the ordinances serve no "'rational relation to the public health, safety, welfare and prosperity of the community.'" *Frericks, supra* at 607-608, quoting *Christine Bldg Co v Troy,* 367 Mich 508, 516; 116 NW2d 816 (1962) (citation omitted).

When no suspect classification is shown, plaintiffs have "the burden of establishing that the statute is arbitrary and not rationally related to a legitimate governmental interest." *Landon Holdings, Inc v Grattan Twp,* 257 Mich App 154, 173; 667 NW2d 93 (2003). "A zoning ordinance may be unreasonable either because it does not advance a reasonable governmental interest or because it does so unreasonably." *Id.* at 173-174.

Plaintiffs' facial challenge to the wetland ordinance relies solely on its alleged conflict with the NREPA and improper provision for buffer zones. Plaintiffs fail to come forward with any legal argument to dispute the stated purpose of statutes and ordinances for the regulation of wetlands as a legitimate matter of "state concern" and the benefits of preserving wetlands within a community or locale. MCL 324.30302(1). In addition, plaintiffs are unable to demonstrate that the regulation precludes any proposed use for the property to which it is "reasonably

adapted." In this instance, the property is zoned residential and plaintiffs have not only constructed a home on the site, but have lived there for a period of time, precluding any legitimate facial challenge to the ordinances.

In reference to plaintiffs' "as applied" challenge, this Court would note that plaintiffs have not received disparate treatment regarding enforcement because evidence has been produced to demonstrate that the prior owners of the property were provided the same restrictions and regulations for building on the property, negating any inference that defendants have applied the ordinances in a manner which is arbitrary or capricious with respect to them. Plaintiffs have argued that their development of the property has resulted in a more aesthetically pleasing site. However, plaintiffs' arguments are legally irrelevant because they do not serve to undermine the rational relationship of the wetland ordinances to the demonstrated governmental interests, *Muskegon Area Rental Ass'n v Muskegon,* 465 Mich 456, 464; 636 NW2d 751 (2001), and focus instead on the advisability of the present zoning classification.

Plaintiffs have argued that defendants' approval of construction and subsequent determination of permit violations and denial of an after-the-fact permit were arbitrary. This argument is belied by the evidence presented by defendants of the numerous meetings pertaining to plaintiffs' permit application and the consistent imposition of conditions on construction on this parcel for both the prior owners and plaintiffs. The Michigan Supreme Court defined the term "arbitrary" in *Goolsby v Detroit,* 419 Mich 651, 678; 358 NW2d 856 (1984):

> Arbitrary is: '[Without] adequate determining principle . . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.' [Internal citations omitted.]

Plaintiffs fail to offer evidence of any action or requirement instituted by defendants that fits this definition. Numerous meetings and inspections of the property were conducted. Input was permitted from a variety of factions including, but not limited to, defendants' own personnel and experts, plaintiffs, neighbors and community members. Further, plaintiffs' argument defies logic. Defendants' approval of plaintiffs' construction on the property is not in contradiction to enforcement of the restrictions imposed in accordance with the permit for construction or denial of an after-the-fact permit request that encompassed items that had been previously rejected or restricted in conjunction with the initial application. Rather than demonstrating the arbitrariness of defendants' actions, plaintiffs have actually shown the inherent consistency of decisions pertaining to development of this property.

As their final issue, plaintiffs contend that the restrictions placed on their property constitute an illegal taking. This Court reviews a trial court's findings of fact for a clear error and disturbs the trial court's findings only when "left with the definite and firm conviction that a mistake has been made." *Essexville v Carrollton Concrete Mix, Inc,* 259 Mich App 257, 265; 673 NW2d 815 (2003). Whether the government has effected a taking of one's property is a constitutional issue, US Const, Am V; Const 1963, art 10, § 2, which this Court reviews de novo. *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005) (citation omitted).

Both the Fifth Amendment of the United States Constitution and the Michigan Constitution, Const 1963, art 10, § 2, provide that private property shall not be taken without just compensation. "The United States Supreme Court has recognized that the government may effectively 'take' a person's property by overburdening that property with regulations." *K & K, supra* at 576. "While all cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land." *Id.* at 576.

Regarding the first type of taking, "zoning regulation has been upheld where it promotes the health, safety, morals, or general welfare even though the regulation may adversely affect recognized property interests." *Bevan v Brandon Twp*, 438 Mich 385, 390; 475 NW2d 37 (1991), amended by 439 Mich 1202 (1981). Broad ranges of governmental purposes satisfy this test, and the validity of an ordinance is presumed. *Id.* at 398.

"The second type of taking, where the regulation de[prives] an owner of economically viable use of land, is further subdivided into two situations: (a) a 'categorical' taking, where the owner is deprived of 'all economically beneficial or productive use of land,' *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional 'balancing test' established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978)." *K & K, supra* at 576-577. "[A] mere diminution in property value that results from a regulation does not amount to a [categorical] taking." *Bevan, supra* at 402-403. To show a categorical taking, an owner must show that there has been a physical invasion of the property or that he has been forced to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good." *K & K, supra* at 577, 586-587. By comparison, under the *Penn Central* balancing test, "the question whether a regulation denies the owner economically viable use of land requires at least a comparison of the value removed with the value that remains." *Bevan, supra* at 391; see also *K & K, supra* at 586-588. "The owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned." *Bevan, supra* at 403. The balancing test requires a court to determine: "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *K & K, supra* at 577, 587-588.

Plaintiffs' reading of MCL 324.30323, suggesting that the imposition of conditions on the wetland permit issued inevitably results in a taking, does not comport with the plain language of the statute. MCL 324.30323(1) indicates that it "shall not be construed to abrogate rights or authority otherwise provided by law." MCL 324.30323(2) merely authorizes initiation of an action "in a court of competent jurisdiction" if an individual has been denied a permit or has been provided a permit which has "been made subject to modifications or conditions" by a local unit of government under the regulatory authority of MCL 324.30307(4). The language of the statute does not, as argued by plaintiffs, determine the occurrence of a taking merely because of the imposition of conditions in an issued wetland permit or by denial of such a permit. Given the viable use of the property by plaintiffs in the construction of a home, and their residence on that site, there can be no assertion of a categorical taking and, thus, the focus of inquiry will pertain to application of the balancing test.

Evaluating the first factor of the balancing test, a taking typically occurs when the government physically invades the property. See *Penn Central, supra* at 124. However, defendants did not physically invade or assert any form of dominion over plaintiffs' land, they merely restricted the manner and extent of development.

Analyzing the economic effect of the regulation is the second factor of the balancing test, and necessitates "a comparison of the value removed with the value that remains." *Bevan, supra* at 391. The record is substantially devoid of any evidence pertaining to a loss in value occasioned by defendants' ordinance other than whatever economic disparity would result in the property not having decks or a traditional backyard area. Even assuming that a loss in value resulted because of these factors, "a mere diminution in property value which results from regulation does not amount to a taking." *Id.* at 402-403, citing *Penn Central, supra* at 131. A disparity in value between the zoned use of the property and its most profitable use is not sufficient to support a determination that a taking has occurred. *Cohen v Canton Twp*, 38 Mich App 680, 689; 197 NW2d 1001 (1972). Instead, "[t]he owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned." *Bevan, supra* at 403, citing *Kirk v Tyrone Twp*, 398 Mich 429, 444; 247 NW2d 848 (1976). Plaintiffs have not asserted or demonstrated that their property is unsuitable or unmarketable for residential use given their current and continued use of the property consistent with its zoning.

Plaintiffs argue that the regulations and restrictions imposed on their construction leave them with "no viable backyard" and, thus, interferes with their investment-backed expectations and constitutes a taking. However, plaintiffs have not shown that having the ability to develop and maintain a backyard on their property was a distinct expectation that led to their decision to acquire the site. Quite to the contrary, in their initial application for a permit plaintiffs indicated that they intended to construct their residence "with minimal disturbance and will use sideyard for recreation leaving wetland natural." Therefore, plaintiffs have failed to satisfy the third factor, which concerns interference with distinct investment-backed expectations. As a result, plaintiffs' claim that defendants' wetland ordinance has effected an unconstitutional regulatory taking fails.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot